

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TRAVIS A. SMITH,

Petitioner,

v.

JEFFERY WOLFE, Warden,
Respondent.

Case No. 2:04-cv-1010

JUDGE SARGUS

Magistrate Judge KEMP

OPINION AND ORDER

On September 27, 2005, the Magistrate Judge issued a *Report and Recommendation* recommending that respondent's motion to dismiss this action as unexhausted be denied, and that proceedings be stayed pending petitioner's completion of state court action on his claims. Both petitioner and respondent have filed objections to the Magistrate Judge's *Report and Recommendation*. See Doc. Nos. 23, 27. Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of those portions of the *Report and Recommendation* that are objected to. For the reasons that follow, petitioner's objections and respondent's objections are **OVERRULED**.

As discussed in the Magistrate Judge's *Report and Recommendation*, petitioner asserts in his federal habeas corpus petition various claims that are not readily apparent from the face of the record; after being advised by the state appellate court that a post conviction petition pursuant to O.R.C. §2953.21 is the proper avenue of relief for raising such claims, petitioner filed a "Petition for Redress of Grievances," which action is apparently still pending before the Ohio Supreme Court. Although it was not clear from the record before this Court at the time the *Report and Recommendation* was issued whether the trial court had ever issued a decision on petitioner's

“Petition for Redress of Grievances,” respondent has attached to his objections a copy of the appellate court’s September 13, 2005, decision denying petitioner’s appeal of the trial court’s decision regarding such action as untimely. *See Exhibit A to Respondent’s Objections*. Petitioner states in his objections that, on October 11, 2005, he filed an appeal of the appellate court’s decision to the Ohio Supreme Court. *See Petitioner’s Objections*, at 4.


Respondent objects to the Magistrate Judge’s recommendation that this action be stayed, rather than dismissed as unexhausted. For the reasons discussed in the *Report and Recommendation*, respondent’s objections are **OVERRULED**.

Petitioner also objects to the Magistrate Judge’s *Report and Recommendation*. Petitioner argues that exhaustion of state court remedies is futile in view of the state appellate court’s dismissal of his post conviction action as untimely, and because his sentence will expire on April 11, 2006. *See id.* This Court is not persuaded by petitioner’s arguments. There is no reason to conclude that the Ohio Supreme Court will not promptly issue a decision on petitioner’s appeal. Further, petitioner may amend the petition to delete any unexhausted claims, if he chooses. *See Rhines v. Weber*, – U.S. –, 125 S.Ct. 1528, 1535 (2005), quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982). Petitioner’s objections also are **OVERRULED**.

The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. Respondent’s motion to dismiss this action as unexhausted is **DENIED**; proceedings in this action are **STAYED** pending petitioner’s exhaustion of state court remedies.

Petitioner must notify the Court within thirty days after the Ohio Supreme Court issues a decision on his now-pending appeal of his petition for post conviction relief. Failure to do so may result in dismissal of this action.

IT IS SO ORDERED.


11-15-2005
EDMUND A. SARGUS, JR.
United States District Judge